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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ELSA DIAZ REYES,

11 Petitioner,

12 v.

13 CHAD WOLF, et al.,

14 Respondents.

CASE NO. C20-0377JLR

ORDER ADOPTING IN PART
AND MODIFYING IN PART
REPORT AND
RECOMMENDATION

15 **I. INTRODUCTION**

16 This matter comes before the court on the Report and Recommendation of United
17 States Magistrate Judge Mary Alice Theiler (R&R (Dkt. # 16)) and the objections thereto
18 filed by the Government respondents (Gov't Obj. (Dkt. # 17)) and by Petitioner Elsa Diaz
19 Reyes (Reyes Obj. (Dkt. # 18)). Magistrate Judge Theiler recommends to the court that it
20 deny the Government's motion to dismiss Ms. Reyes's 28 U.S.C. § 2241 immigration
21 habeas petition, grant Ms. Reyes's habeas petition, and order the Government to provide
22 Ms. Reyes a bond hearing. (R&R at 1.) Ms. Reyes filed a response to the Government's

1 objection (Reyes Resp. (Dkt. # 19)) and a notice regarding the status of her removal
2 proceedings before the Ninth Circuit Court of Appeals (Reyes Notice (Dkt. # 20)). The
3 Government did not respond to Ms. Reyes's objections. (*See generally* Dkt.) Having
4 carefully reviewed the foregoing documents, the balance of the record, and the applicable
5 law, the court ADOPTS the Report and Recommendation as modified.

6 **II. BACKGROUND**

7 Because the Report and Recommendation sets forth the detailed factual and
8 procedural background of this case (*see* R&R at 2-4), the court does not repeat it here.
9 Since the Report and Recommendation was filed, however, the Ninth Circuit issued its
10 decision granting in part, denying in part, and dismissing in part Ms. Reyes's *pro se*
11 petition for review of the Board of Immigration Appeals' ("BIA") dismissal of her appeal
12 of the Immigration Judge's ("IJ") decision denying her application for relief under the
13 Convention Against Torture ("CAT"). (*See* Reyes Notice.) The Ninth Circuit affirmed
14 the BIA's conclusion that Ms. Reyes had failed to show that it was more likely than not
15 that she would be tortured by family members or former guerillas if she returned to El
16 Salvador. *Diaz-Reyes v. Barr*, No. 19-70955, 2020 WL 6375732, at *1 (9th Cir. Oct. 26,
17 2020). The Ninth Circuit also held, however, that the BIA "failed to analyze [Ms.
18 Reyes's] claims that she fears future torture by Jaime Magana and by the father of her
19 children, Heriberto Coria Cerdo." *Id.* The Ninth Circuit stayed Ms. Reyes's removal and
20 remanded the matter to the BIA to consider the likelihood of torture by Mr. Magana and
21 Mr. Coria Cerdo and whether procedural safeguards for Ms. Reyes are necessary in light
22 of the mental health issues she outlined in her reply brief. *Id.*

III. ANALYSIS

In their objections, both Ms. Reyes and the Government argue that Magistrate Judge Theiler applied the incorrect test when determining that Ms. Reyes was entitled to a bond hearing. (*See* Reyes Obj. at 1-5; Gov't Obj. at 2-3.) The Government also objects to Magistrate Judge Theiler's consideration of two the factors she applied in her analysis as incomplete and to her determination that the Government bears the burden to prove at Ms. Reyes's bond hearing that Ms. Reyes is dangerous or a flight risk. (*See* Gov't Obj. at 3-7.) The court begins by reviewing Magistrate Judge Theiler's recommendation regarding the test that the court should apply when evaluating whether Ms. Reyes is entitled to a bond hearing. The court then turns to the Government's objections regarding Magistrate Judge Theiler's consideration and weighing of the applicable factors and her recommendation regarding the burden of proof at the bond hearing.

A. Standard of review

A district court has jurisdiction to review a magistrate judge's report and recommendation on dispositive matters. *See* Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The court reviews de novo those portions of the report and recommendation to which specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

B. The test for determining whether Ms. Reyes’s detention violates the Due Process Clause

Ms. Reyes generally agrees with the Report and Recommendation. (Reyes Obj. at 1.) She objects, however, to the Magistrate Judge’s conclusion that the court should apply the eight-factor test outlined in *Martinez v. Clark*, No. C18-1669RAJ-MAT, 2019 WL 5968089, at *9 (W.D. Wash. May 23, 2019), *adopted by* No. C18-1669RAJ, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019), to determine whether the Due Process Clause entitles her to a bond hearing. (*See* Reyes Obj. at 2-5.) Specifically, Ms. Reyes objects to Magistrate Judge Theiler’s inclusion of two of the *Martinez* factors in her analysis: the length of time Ms. Reyes spent in prison for the crime that made her removable and the nature of the crimes Ms. Reyes committed.¹ (*Id.*) She contends that these two factors are not relevant to determining whether the procedural protections of a bond hearing apply in the first instance and should be considered only at the bond hearing itself. (*Id.* at 2.) She asks the court to apply instead the six-factor test set forth in *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019), which omits any consideration of the detainee’s criminal history and sentence. (Reyes Obj. at 2.)

The Government did not respond to Ms. Reyes’s objection. In its own objections, however, the Government argues that Magistrate Judge Theiler should have employed the

¹ The complete set of *Martinez* factors includes “(1) the total length of detention to date; (2) the likely duration of future detention; (3) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (4) the nature of the crimes the petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by the petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal.” *Martinez*, 2019 WL 5968089, at *9.

1 three-part test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) rather than the
2 eight-part *Martinez* test.² (Gov't Obj. at 1-2.) Alternatively, the Government argues that
3 Magistrate Judge Theiler should have considered an additional factor informed by
4 *Mathews* in applying the *Martinez* test: the Government's burden in providing a bond
5 hearing. (Gov't Obj. at 2-3.)

6 The parties presented thorough argument in their briefing on the Government's
7 motion to dismiss regarding the test the court should apply and the factors the court
8 should consider. (See Gov't Mot. to Dismiss (Dkt. # 8) at 4-6; Reyes Resp. to Mot. to
9 Dismiss (Dkt. # 10) at 2-6.) The parties' objections fail to raise any novel issues that
10 were not addressed in their prior briefing or by Magistrate Judge Theiler's Report and
11 Recommendation. The court has thoroughly examined the record and the cited law and is
12 persuaded by Magistrate Judge Theiler's explanation of why she recommends that the
13 court apply the eight-factor *Martinez* test rather than the *Banda* or *Mathews* tests, and
14 why she rejected the Government's proposal to add a factor that considers the
15 Government's burden in providing a bond hearing. (See R&R at 7-11.) Because the
16 parties merely repeat the arguments that they made to Magistrate Judge Theiler, the court
17 rejects those arguments for the same reasons Magistrate Judge Theiler rejects them in her
18 Report and Recommendation. The court therefore overrules the parties' objections and
19 ADOPTS Magistrate Judge Theiler's conclusion that the court should apply the
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21 ² The *Mathews* test requires considering (1) the private interest affected, (2) the
22 government's interest, and (3) the value added by additional or substitute procedural safeguards
in the situation before the court. *Mathews*, 424 U.S. at 334.

eight-factor *Martinez* test in evaluating Ms. Reyes’s entitlement to a bond hearing (*see* R&R at 7-11).

C. Evaluation of the *Martinez* factors

The Government objects that Magistrate Judge Theiler’s consideration of two of the *Martinez* factors—the likelihood that removal proceedings will result in a final order of removal and the delays in the removal proceedings attributable to Ms. Reyes—was incomplete. (Gov’t Obj. at 3-6.) In addition, the court notes that the passage of time since Magistrate Judge Theiler issued her Report and Recommendation has affected the court’s analysis of two additional factors: the length of Ms. Reyes’s detention to date and the likely duration of future detention.³ The court’s review of these four factors is informed by the Ninth Circuit’s recent decision granting in part Ms. Reyes’s petition for review of the denial of her application for relief under the CAT. *Diaz-Reyes*, 2020 WL 6375732, at *1.

1. Likelihood that removal proceedings will result in a final order of removal

The “likelihood of removal” inquiry focuses on whether the “noncitizen has asserted a good faith challenge to removal.” *Martinez*, 2019 WL 5968089, at *10. Magistrate Judge Theiler declined to weigh in on the merits of Ms. Reyes’s appeal to the

³ The court finds that Magistrate Judge Theiler’s analysis of the remaining *Martinez* factors—Ms. Reyes’s criminal sentence, the nature of her crime, the conditions of detention, and delays in the removal proceedings attributable to the Government—are unaffected by subsequent events and are unchallenged by the parties. (*See* R&R at 12-14.) The court therefore ADOPTS those portions of the Report and Recommendation and considers them in its weighing of the *Martinez* factors below.

1 Ninth Circuit. (R&R at 16.) Nevertheless, she concluded that this factor weighed
2 slightly in Ms. Reyes’s favor because the Ninth Circuit had granted Ms. Reyes a stay of
3 removal pending the resolution of her appeal of the BIA’s decision denying her CAT
4 relief, thus demonstrating that Ms. Reyes’s challenge to her removal was in good faith.
5 (*Id.*) The Government objects that this “cursory analysis” is insufficient, and that instead
6 the court should “consider whether the noncitizen’s continued pursuit of relief from
7 removal is likely to be successful on the merits.” (Gov’t Obj. at 3-4.)

8 In support of its argument, the Government cites *Martinez*, 2019 WL 5968089 at
9 *10, in which the court stated that it did “not have sufficient information to determine
10 whether the appeal is nonfrivolous or whether petitioner ultimately will prevail” and
11 therefore concluded that the factor did not weigh in favor of either party. (Gov’t Obj. at
12 4.) The Government also emphasizes that the Ninth Circuit’s review of a petition is
13 deferential to the Government. (*Id.*) For these reasons, the Government argues, it is
14 likely that the Ninth Circuit proceedings would conclude in a final order of removal.
15 (*Id.*)

16 Since the Report and Recommendation was filed, however, the Ninth Circuit
17 granted in part Ms. Reyes’s petition for review. *Diaz-Reyes*, 2020 WL 6375732, at *1.
18 Because Ms. Reyes prevailed in part on her appeal to the Ninth Circuit, it is now
19 apparent—in contrast to *Martinez*—that Ms. Reyes’s appeal was nonfrivolous and that
20 her challenge to her removal was in good faith. Although the court is unable to
21 determine on the record before it whether Ms. Reyes will ultimately prevail on her
22 application for CAT relief, the court finds that Ms. Reyes has now established that she

1 has legitimate, good faith defenses to removal. Therefore, the court concludes that this
2 factor weighs in Ms. Reyes's favor.

3 **2. Delays in the removal proceedings attributable to Ms. Reyes**

4 In considering the nature and extent of any delays in the removal proceedings
5 attributable to Ms. Reyes, the court is mindful that Ms. Reyes "is entitled to raise
6 legitimate defenses to removal . . . and such challenges to [her] removal cannot
7 undermine [her] claim that detention has become unreasonable." *Martinez*, 2019 WL
8 5968089, at *10 (quoting *Liban M.J. v. Sec'y of Dept. of Homeland Security*, 367
9 F. Supp. 3d 959, 965 (D. Minn. 2019)). This factor weighs against the noncitizen where
10 she "has 'substantially prolonged [her] stay by abusing the processes provided,'" but not
11 when she "simply made use of the statutorily permitted appeals process." *Hechavarria v.*
12 *Sessions*, 891 F.3d 49, 56 n.6 (2d Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 436
13 (2009)).

14 Magistrate Judge Theiler found that the primary dispute in this case regarding Ms.
15 Reyes's responsibility for delays in her removal proceedings arose from the stay of
16 proceedings in the Ninth Circuit that Ms. Reyes requested pending the adjudication of her
17 application for a T visa. (R&R at 14-15.) Magistrate Judge Theiler did not find that Ms.
18 Reyes's request for a stay was an abuse of the available processes. (*Id.* at 15.) Rather,
19 she concluded that even if the twelve-month delay in Ms. Reyes's removal proceedings
20 resulting from her request for a stay were attributed to Ms. Reyes, that delay would not
21 affect her entitlement to a bond hearing. (*Id.*) In weighing the *Martinez* factors,
22 Magistrate Judge Theiler determined that, even if the twelve-month delay arising from

1 Ms. Reyes's request for a stay were attributed to Ms. Reyes, there remained twelve
2 months of detention that could not be attributed to delays by Ms. Reyes. (*Id.* at 17.)

3 The Government objects that Magistrate Judge Theiler failed to account "for the
4 fact that Petitioner chose to pursue an appeal of the Immigration Judge's decision to the
5 Board of Immigration Appeals . . . which was not successful but served to lengthen her
6 proceedings before the agency and, consequently, her mandatory detention." (Gov't Obj.
7 at 5.) It contends that the decision to "take an unsuccessful administrative appeal to the
8 [BIA] was solely Petitioner's choice." (*Id.* at 6.) But Ms. Reyes was entitled to pursue in
9 good faith the processes available to her under the immigration laws, and the Ninth
10 Circuit ultimately granted in part her petition for review of the BIA's adverse decision.
11 *See Martinez*, 2019 WL 5968089, at *10; *Diaz-Reyes*, 2020 WL 6375732, at *1. The
12 court, therefore, agrees with Magistrate Judge Theiler that no more than twelve months of
13 delay can be attributed to Ms. Reyes. Assuming without deciding that Ms. Reyes is
14 responsible for twelve months of delay out of her 28-month detention (*see below*), the
15 court finds that this factor weighs only slightly in favor of the Government.

16 **3. Length of detention to date**

17 The length of Ms. Reyes's detention is the most important factor in the court's
18 review of the *Martinez* test. *See Martinez*, 2019 WL 5968089, at *9; (*see also* R&R at 11
19 (citing cases)). As Magistrate Judge Theiler observed, courts have found that detention
20 periods of greater than six months, twelve months, and thirteen months weighed in favor
21 of granting a bond hearing. (*See* R&R at 11-12 (citing *Sajous v. Decker*, No. C18-2447,
22 2018 WL 2357266, at *10 (S.D.N.Y. May 23, 2018); *Liban M.J.*, 367 F. Supp. 3d at 963-

64; and *Martinez*, 2019 WL 5968089, at *9).) Here, Ms. Reyes has been held in ICE custody since July 19, 2018, or 28 months.⁴ The court finds, therefore, that this factor weighs more heavily in Ms. Reyes’s favor today than it did in Magistrate Judge Theiler’s analysis.

4. Likely duration of future detention

Finally, the court “considers how long the detention is likely to continue absent judicial intervention; in other words, the anticipated duration of all removal proceedings including administrative and judicial appeals.” *Martinez*, 2019 WL 5968089, at *9. When Magistrate Judge Theiler issued her Report and Recommendation, the Ninth Circuit had recently lifted its stay of proceedings in Ms. Reyes’s petition for review. Magistrate Judge Theiler estimated, at that time, that it might take another nine to twelve months for the Ninth Circuit to issue its decision. The Ninth Circuit, however, issued its decision granting in part Ms. Reyes’s petition for review less than three months after Magistrate Judge Theiler filed the Report and Recommendation. The Ninth Circuit has now remanded Ms. Reyes’s case for further consideration by the BIA, *see Diaz-Reyes*, 2020 WL 6375732, at *1, and it is unclear how long subsequent proceedings before the BIA will take. Furthermore, as Ms. Reyes points out, if the BIA again denies relief following remand, Ms. Reyes will be entitled to appeal that decision to the Ninth Circuit. (*See Resp. Notice at 1.*) Accordingly, the court finds that this factor weighs in Ms.

⁴ As discussed above, even if twelve months of delay in her removal proceedings can be attributed to Ms. Reyes, the result is that she has been in detention pending the completion of her removal proceedings for sixteen months. The court finds, based on the authorities above, that sixteen months of detention weighs strongly in favor of Ms. Reyes.

1 Reyes's favor slightly more heavily than it did when Magistrate Judge Theiler filed the
2 Report and Recommendation.

3 **5. Weighing the factors**

4 Following its de novo review of the record, the court finds that the following
5 *Martinez* factors weigh in favor of finding that Ms. Reyes's continued detention has
6 become unreasonable: the length of her detention, which has surpassed 28 months and
7 thus strongly favors Ms. Reyes; the duration of her future detention, which is uncertain
8 but could be prolonged depending on the BIA's decision following remand; the
9 conditions of detention at the NWIPC (*see* R&R at 13-14); and the likelihood that
10 removal proceedings will result in a final order of removal. The following factors weigh
11 in favor of finding that Ms. Reyes's detention is reasonable and does not violate due
12 process: Ms. Reyes's conviction for a serious crime and a ten-year criminal sentence that
13 was far longer than her current detention (*see* R&R at 12 & 17 (noting that the weight of
14 these factors "is mitigated somewhat by the circumstances surrounding Petitioner's
15 participation in the crime and the sentencing judge's belief that the mandatory minimum
16 was overly harsh in her case")); the lack of delay by the Government; and a delay in
17 removal proceedings of up to twelve months attributable to Ms. Reyes.

18 Having considered the totality of these factors, the court finds that the factors
19 favoring Ms. Reyes weigh most heavily. In particular, as discussed above, the length of
20 Ms. Reyes's detention and the likelihood that her removal proceedings will result in a
21 final order of removal bear greater weight today than they did when Magistrate Judge
22 Theiler filed the Report and Recommendation, while none of the factors favoring the

1 Government bear more weight today than they did before. The court concludes that Ms.
2 Reyes's mandatory detention of 28 months has become unreasonable and is in violation
3 of her due process rights and that Ms. Reyes is, therefore, entitled to a bond hearing
4 before an IJ.

5 **D. The Government's burden of proof at the bond hearing**

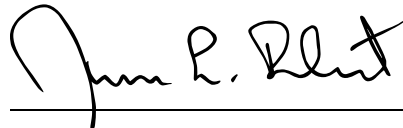
6 Finally, the Government objects to Magistrate Judge Theiler's conclusion that the
7 Government must provide clear and convincing evidence at Ms. Reyes's bond hearing
8 that she is dangerous or a flight risk to justify her continued detention. (Gov't Obj. at
9 6-7; *see* R&R at 17-19.) Magistrate Judge Theiler based her determination that the
10 Government bears the burden at the bond hearing on *Singh v. Holder*, 638 F.3d 1196,
11 1203-04 (9th Cir. 2011), in which the Ninth Circuit determined that constitutional due
12 process required the government to meet the clear and convincing burden of proof
13 standard. (*See* R&R at 18-19.) Although the Government relies in its objections on
14 *Jennings v. Rodriguez*, 138 S. Ct. 380 (2018), the Ninth Circuit has recently held that
15 *Jennings* does not invalidate *Singh*'s constitutional due process holding. *Aleman*
16 *Gonzales v. Barr*, 955 F.3d 762, 781 (9th Cir. 2020) (rejecting the Government's reliance
17 on *Jennings* and reaffirming that the Government must justify an alien's continued
18 detention under by clear and convincing evidence). (*See* R&R at 19.) The court must
19 follow the Ninth Circuit's holdings in *Singh* and *Aleman Gonzales*. Therefore, the court
20 overrules the Government's objection and ADOPTS Magistrate Judge Theiler's
21 conclusion that the Government must justify Ms. Reyes's continued detention by clear
22 and convincing evidence at her bond hearing (*see* R&R at 17-19).

VI. CONCLUSION

For the foregoing reasons, the court hereby ORDERS as follows:

- (1) The court ADOPTS the Report and Recommendation as modified above with respect to the analysis and weighing of the *Martinez* factors;
- (2) The court DENIES the Government's motion to dismiss (Dkt. # 8);
- (3) The court GRANTS Ms. Reyes's habeas petition (Dkt. # 1);
- (4) Within 30 days of the date of this order, the Government shall release Ms. Reyes on bond or reasonable conditions unless Ms. Reyes receives a bond hearing before an immigration judge at which the Government justifies her continued detention by clear and convincing evidence; and
- (5) The Clerk is directed to send copies of this order to the parties and to Magistrate Judge Theiler.

Dated this 20th day of November, 2020.



JAMES L. ROBART
United States District Judge